



# CITY OF LODI COUNCIL COMMUNICATION

**AGENDA TITLE:** Adopt Resolution Approving the Single Member Services Agreement by and between the City of Lodi and the Northern California Power Agency and Authorizing the City Manager to Execute Said Agreement (\$30,400)

**MEETING DATE:** June 6, 2012

**PREPARED BY:** Electric Utility Director

---

**RECOMMENDED ACTION:** Adopt a resolution approving the Single Member Services Agreement by and between the City of Lodi and the Northern California Power Agency and authorizing the City Manager to execute said agreement, in the amount of \$30,400.

**BACKGROUND INFORMATION:** The California Renewable Energy Resources Act, which became effective on December 10, 2011, requires that the amount of electricity generated from eligible renewable energy resources be increased to at least 20 percent of the total electricity sold to retail customers in California by December 31, 2013, 25 percent by December 31, 2016 and 33 percent by December 31, 2020.

While Lodi will need to adopt a Renewable Energy Resources Procurement Plan (RPS Procurement Plan) to meet the requirements, the California State Energy Commission (CEC) still has not published the details of the requirements for such RPS Procurement Plans, though they were required to do so no later than December 31, 2011. Staff anticipates bringing a RPS Procurement Plan to Council for approval in the first quarter of fiscal year 2012/13. We do know that different amounts of varying types of renewable resources in various years will be required. These different types are called Portfolio Content Categories (PCC), see Attachment A.

In anticipation of the RPS Procurement Plan, staff has completed a preliminary analysis. Based on this analysis it is expected that no net purchases will be required to meet renewable resource requirements through calendar year 2013. Analysis has also shown that Lodi has a surplus of the more valuable PCC 1 which includes renewable resource products that are scheduled from an eligible renewable energy resource directly into a California balancing authority. Lodi's surplus comes mostly from our entitlements to Northern California Power Agency (NCPA) geothermal plants.

This excess PCC 1 may be sold and replaced with a much less expensive PCC 3 resource. PCC 3 includes unbundled renewable energy credits that do not qualify under the criteria for other Content Categories. This exchange of PCC types may result in savings to Lodi of as much as \$2 million this fiscal year.

NCPA is currently working to modify the Market Power Purchase Agreement (MPP) to enable NCPA to make these types of transactions for the MPP Participants, which includes Lodi. Unfortunately it is unlikely that the MPP can be modified in time to make the transactions that need to be completed this

---

APPROVED:

Konradt Bartlam, City Manager

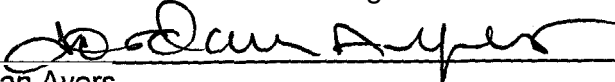
year. Lodi itself has neither the time nor experience to complete these transactions on our own, in the available time frame.

NCPA has developed the Single Member Services Agreement (SMSA) and the attached scope of work (Advisory Services) to facilitate such independent transactions, by assisting their members in carrying out economic and timely transactions. The SMSA will allow additional scopes of to be attached to it in the future, as needed from time to time. Any additional scopes of work will require separate approvals by both NCPA and Lodi. The City of Alameda has recently approved its SMSA scope of work for the same services as those to be provided to Lodi.

Potential transactions that come out of this process will still need to be approved in accordance with Lodi's existing approval process.

**FISCAL IMPACT:** An amount not to exceed \$30,400.

**FUNDING AVAILABLE:** Included in FY2012/13 EUD Budget Account Number 160603.

  
\_\_\_\_\_  
Jordan Ayers  
Deputy City Manager/Internal Services Director

  
\_\_\_\_\_  
Elizabeth A. Kirkley  
Electric Utility Director

**PREPARED BY:** Matt Foscett, Rates and Resources Manager

EAK/MF/lst

**SINGLE MEMBER SERVICES AGREEMENT  
FOR  
SPECIAL TRANSACTIONS  
BY AND BETWEEN THE  
CITY OF LODI  
AND THE  
NORTHERN CALIFORNIA POWER AGENCY**

This Single Member Services Agreement for Special Transactions (the “Agreement”) is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2012 (“Effective Date”), by and between the Northern California Power Agency (“NCPA”), a California joint powers and public entity having its central office at 651 Commerce Drive, Roseville, California and the City of Lodi (“Member”), a municipal corporation and member of NCPA, having its central office at 221 W. Pine Street, Lodi, California. NCPA and the Member are occasionally herein referred to individually as a “Party” or collectively as the “Parties”. This Agreement is premised on the following.

**RECITALS:**

WHEREAS, NCPA provides, among other services to its membership: electric generation facility development and power resource pooling services to the majority of its member public entities and an associate nonprofit member,

and technical, operational, and maintenance services on behalf of the majority of member and associate member entities, for the operation and maintenance of NCPA electric generating projects in which they are invested, as well as dispatch, scheduling coordination, trading and risk management services, so that the members of NCPA on the whole, exercising their common powers pursuant to the Joint Exercise of Powers Act, may supply electrical power and energy for their residential, commercial, and industrial customers or own use on a reliable, cost-effective, and environmentally sensitive basis, with the advantages of the economy of scale, which may, under some circumstances, benefit all of NCPA's members; and

WHEREAS, the Member, as a member of NCPA, while it looks to NCPA in part for the services described above, it nevertheless wishes to request that NCPA provide special services, in the nature of an advisor or agent, by which the Member may receive an advantage by avoiding the cost of the embedded expertise that it would have to employ in the absence of NCPA, and the risks associated therewith, so that the Member may, at its sole risk, and without hazard to NCPA and its other members, receive benefits, when other NCPA members may not share interests in this Member's particular effort; and

WHEREAS, this Agreement has been drawn to first protect NCPA and its members from any exposure to liability of any kind that might result from any

act or omission in the performance of this Agreement, to the fullest extent permitted by law, due to the fact that NCPA will be acting for the Member and not for any other member in its performance of this Agreement and due to the further fact that the benefit of this Agreement to the other members is limited to the extent to which the challenges of this Agreement develop in NCPA further skill and expertise, but not to any economic or financial benefit for which those members should be liable; and

WHEREAS, the Member desires to utilize the benefits of the investment in, and expertise available through the auspices of NCPA, and NCPA having weighed the consideration herein, and the protection the Member intends to provide NCPA and its other members in this Agreement, wishes to assist the Member;

Now, Therefore, in consideration of the premises and the mutual covenants and conditions set forth herein, the Parties have entered into this Agreement.

### **Article 1 – SCOPE OF SERVICES**

Upon mutual agreement, and subject to the General Conditions described below, NCPA will provide to the Member Advisory Services, Agency Services, Pooled Subscription Services, and Power Procurement Services (Services), for

Power Transactions, Gas Transactions, and Financial Transactions (collectively Transactions), as defined and described in this Agreement.

**1.1 General Conditions.** NCPA shall not be obligated under this Agreement to provide any Services to, or undertake any Transactions for, the Member, notwithstanding that fact that the Member may have completely and faithfully complied with each and every term, condition, and covenant of this Agreement. NCPA may decline to furnish any Service or Transaction requested by the Member in the sole and absolute discretion of NCPA, acting by and through its Commission without the vote of the Member, and such discretion of the Commission shall not be subject to review or to the dispute resolution provisions of this Agreement or of other agreements between the Member and NCPA; provided, however, that, notwithstanding the foregoing, should NCPA have agreed in a written Confirmation, as provided for in Attachment B hereto, to provide any Service to or undertake any Transaction for the Member; provided that the Member is then at the time of the Confirmation not in default of, and has completely and faithfully complied with each and every term, condition, and covenant of this Agreement, then NCPA shall provide such Service or undertake such Transaction.

**1.2 Power Transactions.** Power Transactions mean Transactions for electrical power, and electrical capacity, energy, exchange, and ancillary services,

or high voltage electric transmission transactions, with parties that are not members of NCPA for the purpose of serving the Member which would benefit and affect the Member, not be of interest to other NCPA members or practicably capable of execution through the NCPA Pooling Agreement or the NCPA Facilities Agreement, and are not subject to a right of refusal.

**1.3 Gas Transactions.** Gas Transactions mean natural gas supply, storage, transportation, and delivery transactions, with parties that are not members of NCPA, for the purpose of serving the Member which would benefit and affect the Member, and not be of interest to other NCPA members or practicably capable of execution through the NCPA Pooling Agreement and the NCPA Facilities Agreement, or the Third Phase Agreements for other natural gas-fueled NCPA projects, and are not subject to a right of refusal.

**1.4 Financial Transactions.** Financial Transactions mean natural gas and electric power national exchange-based transactions, or such financial transactions with parties that are not members of NCPA, for the purpose of hedging or protecting the Member's exposure to the market risks of volatility in the natural gas and electric power markets which would benefit and affect the Member, and not be of interest to other NCPA members, or practicably capable of execution through the NCPA Pooling Agreement or the Third Phase Agreements for other NCPA projects, and not subject to a right of refusal.

**1.5 Advisory Services.** Advisory Services mean technical, economic, financial, legal, risk and credit analysis, and other advice of a professional nature, related to the potential or ongoing Services that NCPA may provide the Member under this Agreement, on a flat monthly retainer basis, for the costs directly associated with this Agreement, shown initially on Attachment A to this Agreement. Advisory Services also include such services provided by NCPA on an hourly fee basis for potential and ongoing Transactions and Agency Services, that will recover for NCPA all of its costs to protect the other NCPA members. NCPA may adjust the monthly retainer and hourly fees as it determines may be required, in its sole discretion, during the preparation and adoption of the NCPA Annual Budget.

**1.6 Agency Services.** Agency Services mean services that NCPA may provide in the capacity of the exclusive agent of the Member, as principal, subject to the General Conditions of this Agreement, to execute and perform Transactions, on an hourly fee basis, that will recover for NCPA all of its costs to protect the other NCPA members.

**1.7 Pooled Subscription Services.** Pooled Subscription Services mean services that NCPA may provide the Member and other members of NCPA as an Advisory Service and an Agency Service, where the Member and at least another member of NCPA (Cooperating Member) has executed a Single Member Services



Agreement for Special Transactions substantially in the form of this Agreement. Pooled Subscription Services include Power Transactions, Gas Transactions, or Financial Transactions that would benefit and affect the Member and the Cooperating Member or Members, and not be of interest to other NCPA members, or practicably capable of execution through the NCPA Pooling Agreement or the Third Phase Agreements for other NCPA projects, and that are not subject to a right of refusal.

**1.8 Power Procurement Services.** Power Procurement Services mean execution of Power Transactions by NCPA in its own name on behalf of the Member where the Member is constrained from the ability to directly contract with the counter party for such Power Transaction.

## **Article 2 – REQUEST FOR SERVICES**

**2.1 Member Request.** After the Effective Date, NCPA shall provide the Member with Advisory Services in consideration of the payment of the monthly retainer. Upon receipt of a written request for Advisory Services with respect to potential Transactions and Agency Services, NCPA will respond to the Member, subject to the General Conditions, with a proposal for fee-based Advisory Services related to the requested potential Transactions or Agency Services, including the number and identity of NCPA personnel, by job

classifications, the hourly estimates, all special programs and services, such as national price reporting services, all materials and equipment, all other pertinent information, such as required outside support, a schedule and an estimate of costs, that would be components of the fee for the fee-based Advisory Services.

**2.2 NCPA Costs of Response.** Before responding, NCPA shall estimate, and provide to the Member the estimate, NCPA's expected costs for responding to the Member Request. The Member shall advance such estimated costs before NCPA provides its response, subject to the General Conditions. NCPA will not respond if it does not receive the advance within twenty days of the date of NCPA's estimate. NCPA will not be liable to the Member if NCPA, after expending all or a part of the advance of estimated costs, declines to respond to, or suggests alternatives to the Member Request, in NCPA's discretion, exercised under the General Conditions.

Notwithstanding the foregoing, if services are ultimately not provided by NCPA, the Member may submit a written request for refund of all unexpended advanced funding of estimated costs related to a specific Member Request. After receipt of the written request for unexpended funds, NCPA will refund unexpended advanced funding to the Member less any outstanding costs, invoices, and other liabilities for which NCPA may be liable as a result of any

services provided or the cost of providing the estimate, as determined in its sole discretion.

**2.3 Mutual Agreement on Scope of Services.** If, after the payment or tender of payment for all of the actual costs to NCPA of responding to the Member Request, or after agreement on the allocation of budget costs, the Member and NCPA agree to the Services that NCPA should provide, NCPA and the Member shall execute and deliver a Confirmation of the Transactions and Services, including any Advisory and Agency Services, that NCPA will provide, if and as requested by the Member.

**2.4 Authentication of Delegation.** Before responding to any Member Request, and again prior to confirming any Services or Transactions, NCPA is entitled to require an authentication of the delegation of any authority of the governing body of the Member to a manager of the Member, by a formal resolution and legal opinion, to confirm that the delegation is appropriate in all respects given the then current documents and the proposed Transactions and Services to be effected thereon. In addition, NCPA may require, as part of the General Conditions, that the Member or its authorized manager delegate authority to NCPA before it undertakes to perform any Services or execute any Transaction on behalf of the Member, in form and substance acceptable to NCPA, in its sole discretion, as provided in the General Conditions. Any delegation of

authority to Member's manager shall require a resolution of the governing body of the Member affirmatively delegating to the manager of the Member the authority required for Transactions or Services under this Agreement.

**2.5 Confirmations.** No obligation as might be imposed by law on NCPA or its other members shall arise unless a written Confirmation accepting that obligation in respect to a Transaction or Service, described in detail in the Confirmation, shall have been accepted by the Member without qualification, and approved by the NCPA Commission. A failure of a Disclosure Statement to describe a risk or effect of a Transaction or Service shall not excuse the Member from its liability therefore, given that the Member shall in all situations be wholly responsible for the Disclosure Statement.

### **Article 3 – DUE DILIGENCE**

**3.1 Creditworthiness of Member.** At the time of making a request for a Transaction, the Member shall advance to NCPA, if required by NCPA, the estimated fee expense for obtaining the unqualified opinion of a nationally ranked certified public accounting firm stating that the Member will have the financial capacity to timely pay and retire all of the costs and liabilities that may be associated with the requested Transaction. Notwithstanding the delivery of an unqualified opinion, pursuant to the General Conditions NCPA may request

the Member to include in a Confirmation covenants to maintain certain financial ratios, to maintain special and reserve funds, to provide security to NCPA, and to raise rates, tariffs, fees or other sources of Revenue.

**3.2 Legal Opinion.** At the time of making a request for a Transaction, the Member shall advance to NCPA, if required by NCPA, the estimated fee expense for obtaining the opinion of a nationally ranked municipal bond law firm (i) that the legal capacity of the Member to delegate the authority to execute and deliver the contract for the Service or Transaction from the governing body to a Member employee or to NCPA, and bind the Member with legal, valid, binding, and enforceable obligations, is without ambiguity under any applicable charter, ordinances, state and federal laws, and regulations, and (ii) that the requested Transaction will not result in any risk of losing the tax exemption for the interest paid on any of the tax exempt obligations of NCPA.

**3.3 Continuing Disclosure.** Annually the Member shall present NCPA with its audited financial statements. NCPA may request the Member to report contemporaneously in writing on significant events that may materially adversely affect the Member's financial capability to timely pay and retire all of the costs and liabilities associated with any outstanding Transaction.

#### **Article 4 – REPRESENTATIONS AND WARRANTIES**

4.1 **Initial Representations and Warranties.** On the Effective Date and the date of entering into each Transaction, the Member represents and warrants to NCPA that:

- (i) it is duly organized, validly existing and in good standing under the laws of California and of the United States;
- (ii) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement);
- (iii) the execution, delivery and performance of this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement) are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (iv) this Agreement, each Transaction (including any Confirmation accepted in accordance with this Agreement), and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation

enforceable against it in accordance with its terms; subject to any Equitable Defenses.

- (v) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (vi) there is not pending or, to its knowledge, threatened against it or any legal proceedings or investigations that could materially adversely affect its ability to perform its obligations under this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement);
- (vii) no Event of Default or Potential Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement);
- (viii) it is acting for its own account, has made its own independent decision to enter into this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement) and as to whether this Agreement and each such Transaction (including any Confirmation accepted in accordance

with this Agreement) is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of NCPA in providing Advisory Services, and the Member is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement); and

- (ix) it has entered into this Agreement and each Transaction (including any Confirmation accepted in accordance with this Agreement) in connection with the conduct of its public service utility enterprise and it has the capacity or ability to make or take delivery of all products referred to in any Transaction to which it is a party.

**4.2 Further Representations and Warranties.** On the Effective Date and the date of entering into each Transaction, the Member further represents and warrants to NCPA that: (i) all acts necessary to the valid execution, delivery and performance of this Agreement, including without limitation, competitive bidding, public notice, election, referendum, prior appropriation or other required procedures has or will be taken and performed as required under the laws of the State of California and the charter, ordinances, bylaws or other regulations, (ii) all persons making up the governing body of the Member are the



duly elected or appointed incumbents in their positions and hold such positions in good standing in accordance with the state and local, and other applicable law, (iii) entry into and performance of this Agreement and each Transaction by the Member are for a proper public purpose within the meaning of all relevant constitutional, organic or other governing documents and applicable law, (iv) the term of this Agreement does not extend beyond any applicable limitation imposed by the relevant constitutional, organic or other governing documents and applicable law, (v) the Member's obligations to make payments hereunder are unsubordinated obligations and such payments are (a) operating and maintenance costs (or similar designation) which enjoy first priority of payment at all times under any and all bond ordinances or indentures or agreements to which it is a party, and all other relevant constitutional, organic or other governing documents and applicable law; (b) not subject to any prior claim under any and all bond ordinances or indentures or agreements to which it is a party, and all other relevant constitutional, organic or other governing documents and applicable law and are available without limitation or deduction to satisfy all of the Member's obligations hereunder and under each Transaction and (c) are payable from operating funds of the Member, (vi) entry into and performance of this Agreement and each Transaction by the Member will not adversely affect the exclusion from gross income for federal income tax purposes

of interest on any obligation of the Member or NCPA otherwise entitled to such exclusion, and (vii) obligations to make payments hereunder do not constitute any kind of indebtedness of the Member or create any kind of lien on, or security interest in, any property or revenues of the Member which, in either case, is proscribed by any provision of any relevant constitutional, organic or other governing documents and applicable law, any order or judgment of any court or other agency of government applicable to it or its assets, or any contractual restriction binding on or affecting it or any of its assets.

**4.3 Primacy of NCPA Projects.** Notwithstanding the availability of NCPA personnel and equipment the Member acknowledges and agrees that the first priority for NCPA personnel are the other NCPA projects in which more than one member participates, and that the Services and Transactions that NCPA provides under this Agreement are subordinate to NCPA's duties to serve the other members.

## **Article 5 – APPROVED TRANSACTIONS**

**5.1 Preparation of Contract Form Risk Disclosure Statements.** At Member's request, NCPA shall prepare a Risk Disclosure Statement to inform the Member of the risks involved in Contract Forms for which the Member requests approval.

**5.2 Governing Body Approval of Contract Forms.** Transactions shall be executed only on Contract Forms approved by the Member's governing body by resolution or by Member's manager with written delegated authority, after presentation of the complete form, and authorized deviations, as well as the Risk Disclosure Statement.

**5.3 Preparation of Counterparty Risk Disclosure Statements.** At Member's request NCPA shall prepare a Counterparty Risk Disclosure Statement to inform the Member or Member's manager with written delegated authority of the risks of entering Transactions with the proposed Counterparties.

**5.4 Governing Body Approval of Counterparty Lists.** Transactions shall be entered only with Counterparties approved by the Member's governing body by resolution or by Member's manager with written delegated authority, in conjunction with any requested Counterparty Risk Disclosure Statement.

**5.5 Preparation of Contract Damages Risk Disclosure Statements.** NCPA shall prepare a Contract Damages Risk Disclosure Statement for each Transaction to inform the Member or Member's manager of the risks of entering a particular Transaction. Member acknowledges that such Contract Damages Risk Disclosure Statements, while representing NCPA's understanding of the risks inherent in a particular Transaction, may not fully encompass all such risks. NCPA shall not be liable to Member for any failure to fully disclose risks to

Member, and Member acknowledges its responsibility to undertake due diligence with respect to any proposed Transaction.

#### **5.6 Governing Body Adoption of Contract Damages Risk**

**Limitations.** Transactions shall be entered only after the Member's governing body has approved by resolution, or after approval by Member's manager with written delegated authority, the particular Transaction after presentation by NCPA of the Contract Damages Risk Disclosure Statement and Member's governing body by resolution or Member's manager with written delegated authority in writing has adopted the following limits:

**5.6.1 Limits on Terms of Contracts.** The Member has adopted by resolution or Member's manager with delegated authority has adopted the following limits on terms of Contracts that may be used in Transactions: **None.**

**5.6.2 Limits on Net Present Value at Risk During Terms of Contracts.**

The Member has adopted by resolution or Member's manager with delegated authority has adopted the following limits on the net present value at risk during the terms of Contracts approved by the Member for Transactions: **None.**

### **Article 6 – OPERATING ACCOUNT AND SECURITY**

**6.1 Operating Account.** The Operating Account is an account established at NCPA pursuant to this Agreement. The Operating Account is established to: (i) make timely payments to NCPA under this Agreement and to a Counterparty pursuant to a Transaction and to protect NCPA from potential Member default by providing funds and time to cure, (ii) to bridge timing differences between the receipt of payments from the Member and the date payments are due a Counterparty, (iii) satisfy any security deposit requirements, and (iv) provide security against Member default.

**6.2 Initial Amount.** Before the effective date of a Transaction, the Member shall deposit in the Operating Account an amount equal to the highest three (3) months of projected Counterparty invoices for the succeeding twelve (12) months. NCPA shall maintain a detailed accounting of the Operating Account. Interest earned on the Operating Account shall be credited to the Member. Any losses in the Operating Account, due for example to the compulsory sale of investments to comply with a requirement of the Counterparty, shall be allocated to the Member. Provided, however, that in the event that the Counterparty to any Transaction is willing to accept contract terms such that NCPA is required to pay the Counterparty only as, if, when and to the extent that NCPA is paid by the Member, then to that extent and with respect to

that Transaction the amount deposited into the Operating Account shall be an amount equal to the highest one (1) month of projected Counterparty invoices.

**6.3 Periodic Reviews.** Prior to the effective date of a Transaction and at least quarterly thereafter, NCPA shall review the balances in the Operating Account to ensure the amount is equal to the current projection of the highest three (3) months of the Member's projected Counterparty invoices for the succeeding twelve (12) months. Any funds in excess of one hundred ten percent (110%) of this amount shall be credited to the Member. If the funds on deposit in the Operating Account are less than ninety percent (90%) of this amount, NCPA shall prepare an invoice to the Member who shall remit such funds within thirty (30) days of the invoice date.

**6.4 Emergency Additions.** In the event that the funds in the Operating Account are insufficient to allow payment of a Counterparty invoice, NCPA shall notify the Member and then prepare and send a special or emergency assessment to the Member.

**6.5 Return of Funds.** On the termination of this Agreement and all Transactions, the Member may apply to NCPA for the return of its Operating Account funds ninety (90) days after the effective date of such termination. NCPA shall, in its sole discretion, as determined by a vote of the Commission, excluding the vote of the Member, estimate the then outstanding liabilities of the

Member, including any estimated contingent liabilities, such as by way of example Counterparty invoices subject to dispute or to revision by the Counterparty or the Federal Energy Regulatory Commission, and retain all such funds until all such liabilities have been fully paid or otherwise satisfied in full. NCPA may apply any remaining Operating Account funds to any remaining obligation of the Member, including but not limited to revised Counterparty invoices.

**6.6 Counterparty Security Deposit.** Any security or other deposit required by a Counterparty for a Transaction shall be provided by the Member prior to the date NCPA provides any Agency Services and shall be maintained as may be required thereafter.

**6.7 Changes in Security.** Any changes in security or other deposits required by the Counterparty may be released by NCPA from the Operating Account, and NCPA shall invoice the Member within ten (10) working days for the total NCPA released to the Counterparty.

**6.8 General Operating Reserve Election:** In connection with fulfilling the Operating Account requirements of this Agreement, Member may elect to maintain the funds required under sections 6.1 through 6.7 above through its individual account in the NCPA General Operating Reserve (G.O.R.). If Member chooses to satisfy its Operating Account requirements in this manner, it will

provide NCPA with an irrevocable Letter of Direction for NCPA to utilize Member's G.O.R in this manner, provided however, nothing herein shall prohibit NCPA and Member from subsequently establishing an escrow account with an independent financial institution in place of holding the aforementioned deposit in the NCPA G.O.R.

## **Article 7 – PAYMENTS AND DEFAULTS**

**7.1 Billing and Payment.** Payments by Member for Services shall be made in advance. Monthly billing statements prepared by NCPA shall be sent to the Member showing the Member's unpaid balance for Transactions and Services and other expenses relating to this Agreement estimated by NCPA for the succeeding month. This information may be provided on monthly billing statements prepared by NCPA pursuant to other Project Agreements with Member. NCPA will provide the monthly billing statements electronically if requested by the Member; otherwise NCPA shall mail the statements by U.S. Postal Service, first class postage pre-paid.

**7.1.1 Disputed Monthly Billing Statement.** In case any portion of any billing statement received by Member from NCPA shall be in bona fide dispute, Member shall pay NCPA the full amount of such billing statement and, upon determination of the correct amount,



the difference between such correct amount and such full amount, if any, shall be credited to Member by NCPA.

**7.2 Application of Operating Account.** NCPA may apply the Member's Operating Account to the payment of any portion of the monthly billing statement. If Member does not timely pay the billing statement, Application of such funds shall not relieve the Member from any late payment charges.

**7.3 Late Payments.** Amounts shown on each billing statement are due and payable at the time noted on the invoice, but not later than thirty (30) days after the date of the invoice, except that any amount due on a Friday, holiday or weekend may be paid on the following working day. Any amount due and not paid by the Member shall bear interest at the per annum prime rate (or reference rate) of the Bank of America NT & SA then in effect, plus two percent per annum computed on a daily basis until paid.

**7.4 Settlement Data.** NCPA will make settlement data, including underlying data received from a Counterparty, available to the Member.

**7.5 Audit Rights.** The Member shall have the right to audit at its expense any data created or maintained by NCPA pursuant to this Agreement or pursuant to a Transaction on thirty (30) days written notice, unless otherwise agreed by the Member and NCPA.

**7.6 Failure To Pay.** If the Member fails to pay any amount due to NCPA within thirty (30) days of the date of the estimated or final invoice enumerating such amounts, the Member is in default and material breach under this Agreement.

**7.7 Other Material Breaches.** If the Member is in default or in breach of any of its covenants under any other agreement with NCPA, it shall also be considered in material default of this Agreement.

**7.8 Cure Period.** Upon written notice by NCPA, the Member shall cure any default within five (5) working days.

**7.9 Cure of Defaults.** A default shall be cured by the payment of any monies due NCPA, including any late payment charges, and repayment of any funds drawn from the Operating Account. A default under any other agreement with NCPA shall be cured by compliance with the covenant.

**7.10 Remedies in the Event of a Material Default.** NCPA may suspend the provision of any Agency Service or Advisory Service to the Member with a default which has not been cured within the Cure Period, including deducting sums in default from the Operating Account of the defaulting Member, demanding further assurances, and taking any other legal or equitable action before or after the Cure Period to compel the correction of the default, as for example, to mandate the collection of a surcharge to produce Revenues to secure

the cure of the default, (and the selection of one remedy shall not preclude the use of other remedies), on behalf of NCPA and other Members (in which event the defaulting Member shall not have the right to vote while such defaulting Member is in material default as determined by the NCPA Commission).

**7.11 Obligations in the Event of Default.** In the event that the Member's share of the Operating Account is insufficient to cover all invoices related to a Transaction or Service provided to the defaulting Member, (i) the defaulting Member shall cooperate in good faith with NCPA and shall cure the default as rapidly as possible, on an emergency basis, taking all such action as is necessary, including, but not limited to, drawing on its cash-on-hand and lines of credit, obtaining further assurances by way of credit support and letters of credit, and taking all such other action as will cure the default quickly; and provided, however, (ii) that neither NCPA nor any other member shall be liable under this Agreement for the obligations of the defaulting Member, and the Member shall be solely responsible and liable for performance of its obligations under this Agreement and each Transaction.

## **Article 8 – TERM OF THIS AGREEMENT**

**8.1 Term of This Agreement.** The term of this Agreement will be ten (10) years from its Effective Date. Six (6) months prior to the fifth-year anniversary date, the Parties will meet to review the Agreement. During the review period and following good-faith negotiations to resolve outstanding issues, either Party may terminate the Agreement. Notwithstanding the foregoing, either Party may, at any time during the term of the Agreement, terminate this Agreement on a date at least ninety (90) days after delivery of a written notice of termination to the other Party, provided that, no termination shall become effective until the termination of all Transactions.

## **Article 9 – NO IMMUNITY CLAIM**

**9.1 No Immunity Claim.** The Member warrants and covenants that with respect to its contractual obligations hereunder and performance thereof, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (i) suit, (ii) jurisdiction of a court (including a court located outside the jurisdiction of its organization), (iii) relief by way of injunction, order for specific performance or recovery of property, (iv) attachment of assets, or (v) execution or enforcement of any judgment.

## **Article 10 – MEMBER COVENANTS**

The definitions in this Article 10 apply to the covenants in section 10.3 and elsewhere in this Agreement.

**10.1 Electric System.** Electric System means, with respect to the Member, all properties and assets, real and personal, tangible and intangible, of the Member now or hereafter existing, used or pertaining to the generation, transmission, transformation, distribution and sale of electric capacity and energy, including all additions, extensions, expansions, improvements and betterments thereto and equipment thereof; provided, however, that to the extent the Member is not the sole owner of an asset or property or to the extent that an asset or property is used in part for the above described purposes, only the Member's ownership interest in such asset or property or only the part of the asset or property used for electric purposes shall be considered to be part of its Electric System.

**10.2 Revenues.** Revenues means, with respect to the Member, all income, rents, rates, fees, charges, and other moneys derived by the Member from the ownership or operation of its Electric System, including, without limiting the generality of the foregoing, (i) all income, rents, rates, fees, charges or other moneys derived from the sale, furnishing and supplying of electric capacity and energy and other services, facilities, and commodities sold, furnished, or supplied through the facilities of its Electric System, (ii) the earnings on and

income derived from the investment of such income, rents, rates, fees, charges or other moneys to the extent that the use of such earnings and income is limited by or pursuant to law to its Electric System, and (iii) the proceeds derived by the Member directly or indirectly from the sale, lease or other disposition of all or a part of the Electric System, but the term Revenues shall not include (a) customers' deposits or any other deposits subject to refund until such deposits have become the property of the Member or (b) contributions from customers for the payment of costs of construction of facilities to serve them.

**10.3 Member Covenants.** The Member covenants and agrees to (i) establish and collect rates and charges for the services and commodities provided by its Electric System sufficient to provide Revenues adequate to meet its obligations under this Agreement and all Transactions combined and to pay all other amounts payable from, and all lawful charges against or liens upon, the Revenues; (ii) make payments under this Agreement from the Revenues of, and as an operating expense of, its Electric System; (iii) make payments under this Agreement whether or not there is an interruption in, interference with, or reduction or suspension of services provided under this Agreement and any transaction (such payments are not subject to any reduction, whether by offset or otherwise, and regardless of whether any dispute exists); and (iv) operate its Electric System and the business in connection therewith in an efficient manner

and at reasonable cost and to maintain its Electric System in good repair, working order, and condition.

## **Article 11 – DELEGATION OF MEMBER AUTHORITY**

**11.1. Delegation to Member Agent.** The Member hereby designates as its authorized agent, the Member manager, to whom by resolution the Member has delegated its authority to execute on its behalf forms of contracts pursuant to this Agreement for use in Transactions subject to the Contract Damages Risk Limitations adopted by the Member's governing body pursuant to section 5.6.

**11.2. Delegation to NCPA.** The Member by resolution or Member's manager with written delegated authority will delegate to NCPA all of the Member's governing body's authority to enter into a Transaction with the delegation to NCPA confirming an Agency Service or Power Procurement Service for such Transaction. Such delegation shall not be revoked by Member or Member's manager during the term of the Transaction.

## **Article 12 – TRANSACTION LITIGATION**

**12.1 Transaction Litigation.** In the event of bankruptcy or insolvency of Member or litigation, dispute resolution, governmental inquiry, including investigations or legislative inquiries, relating to any matter involving this

Agreement or any Service or Transaction, NCPA may select Counsel of its choice to advise and represent NCPA and the Member, and the Member shall pay NCPA for such expenses, as billed pursuant to this Agreement. Provided, however, that NCPA will not initiate litigation against third persons related to or arising out of this Agreement without Member's concurrence.

### **Article 13 – UNCONTROLLABLE CIRCUMSTANCES & SUSPENSION OF PERFORMANCE**

13.1 **Definition.** In this Agreement "Uncontrollable Circumstances" shall mean acts, events or conditions not reasonably foreseeable by a Party which prevent the affected Party from performing its obligations under this Agreement, except the obligation for the payment of money, if and only if such acts, events or conditions and their effects (i) are beyond the reasonable control of such Party (or any third Party over whom such Party has control), (ii) are not reasonably avoidable, (iii) cannot be mitigated or eliminated through reasonably available alternative actions, and (iv) are not a result of the willful or negligent action or inaction of such Party or of any third Party over whom such Party has control.

Examples of Uncontrollable Circumstances include, but are not limited to, the following:



- 13.1.1 An act of God, landslide, lightning, earthquake, fire, explosion, storm, flood, or weather conditions precluding construction activity from progressing;
- 13.1.2 Acts of a public enemy, war, blockade, insurrection, strike, riot or civil disturbance, sabotage or similar occurrence or a mandate, directive, order, or restraint of any governmental, regulatory or judicial body or agency, or the exercise of the power of eminent domain, police power, inverse condemnation or other taking by or on behalf of any public, quasi-public or private entity; or
- 13.1.3 A Change in Law. In this Agreement, a Change in Law shall mean a material change in the requirements of the Scope of Services or the operation or maintenance of the Project, made by a governmental authority, that becomes effective on or after the date of this Agreement.

**13.2 Suspension of Performance.** The suspension of performance due to Uncontrollable Circumstances shall be no longer than reasonably required, and the Party suffering the Uncontrollable Circumstances shall use its best reasonable efforts to overcome such circumstances and partially or fully remedy its inability to perform. The Party suffering the Uncontrollable Circumstance

shall give the other Party notice that is reasonable under such circumstances, including written notice as soon as practicable.

#### **Article 14 - INDEMNIFICATION, DEFENSE, AND RELEASE**

**14.1 Indemnity Obligation of Member.** The Member hereby assumes all responsibility and liability for the Transactions and Services provided under the Agreement as if they were performed by the Member's employees and accordingly intends to protect NCPA, its member entities, governing officials, officers, agents, and employees against claims or losses of any kind whatsoever resulting from Transactions and Services provided pursuant to this Agreement. The Member is willing to take on such complete responsibility as an inducement to NCPA to enter into this Agreement. NCPA would not enter into this Agreement absent such inducement for NCPA's sole source of revenue comes from its members, which cannot be exposed to the risks of loss or damage due to Transactions, Services, or this Agreement. Thus, the Member (the "Indemnifying Party") agrees to indemnify, defend and hold harmless NCPA and its members, including their respective governing officials, officers, agents, and employees ("Indemnified Party or Parties"), from and against any and all claims, administrative actions, suits, losses, damages, expenses and liability of any kind or nature, including, without limitation, reasonable attorneys' fees ("Claim" or

collectively “Claims”) including but not limited to those caused by any breach of contract, negligence, active or passive, gross negligence or willful misconduct of the Indemnifying Party, its officers, employees, subcontractors or agents, to the maximum extent permitted by law, but only as to Claims related to this Agreement.

**14.2 Notice and Defense.** Promptly after receipt by an Indemnified Party of any Claim or notice of a Claim or the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in section 14.1 may apply, the Indemnified Party shall notify the Indemnifying Party of such fact. The Indemnifying Party shall have the right to assume the defense thereof with counsel designated by the Indemnifying Party and satisfactory to the Indemnified Party; provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party, and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it and/or other Indemnified Parties which are different from or additional to those available to the Indemnifying Party, the Indemnified Party or Parties shall, at the expense of the Indemnifying Party, have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such Indemnified Party or Parties.

**14.3 Failure to Assume Defense.** Should any of the Indemnified Parties be entitled to indemnification under section 14.1 as a result of a Claim by a third Party, and should the Indemnifying Party fail to assume the defense of such Claim after reviewing notification thereof as provided in section 14.2, then such Indemnified Party may, at the expense of the Indemnifying Party, contest or settle such Claim. To the extent that any of the Indemnified Parties is required to initiate and prevails in legal proceedings against the Indemnifying Party to enforce rights under this Article, the Indemnifying Party shall pay all costs and attorneys' fees incurred by the Indemnified Party in enforcing its rights. In addition to the foregoing, a failure to assume defense as provided may be deemed by NCPA a material breach of this Agreement.

**14.4 Release and Covenant Not to Sue.** The Member hereby forever releases and discharges NCPA, its members, governing officials, officers, agents, employees, and subcontractors (Released Parties) from any and all liabilities, claims, demands or causes of action that the Member may hereafter have for injuries, damages, or losses of any kind whatsoever arising out of the Transactions, Services or this Agreement performed or not performed, or inadequately performed by NCPA, including, but not limited to, losses caused by the passive or active negligence of the Released Parties or hidden, latent, or obvious defects in equipment or materials used.

The Member understands and acknowledges that the Project and the Services have inherent dangers that no amount of care, caution, instruction or expertise can eliminate and the Member expressly and voluntarily assumes all risk of death, personal injury, damages or losses of any kind whatsoever sustained in connection with the Project and the Services, including the risk of passive or active negligence of the Released Parties, or hidden, latent, or obvious defects in the materials used.

The Member hereby forever covenants not to sue the Released Parties for any injuries, damages, or losses, or liabilities, claims, demands or causes of action related thereto, to which the foregoing release applies.

## **Article 15 - GENERAL PROVISIONS**

**15.1 Independent Contractor.** NCPA shall be an independent contractor with respect to the Services to be performed hereunder. Neither NCPA nor its subcontractors, nor their agents or employees, shall be deemed to be the servants, employees, or agents of the Member, notwithstanding Article 14.

**15.2 Occupational Safety and Health Act.** The Member shall design, equip, and maintain and operate in accordance with all applicable rules, regulations, orders, standards and interpretations promulgated under the Occupational Safety and Health Act (1970) (OSHA), as amended and in effect as

of the day of execution of this Agreement or such similar act as adopted by the State of California, if applicable.

**15.3 Proprietary Information.** To the extent permitted by law, in particular the California Public Records Act, the Parties shall maintain the confidentiality of proprietary information.

**15.4 Patents.** The Member shall defend, indemnify and hold harmless NCPA from any suit or action brought against NCPA based on a claim that any item, materials or equipment procured pursuant to this Agreement, or any part thereof, furnished or specified by NCPA or the Member hereunder or any use thereof for purposes of this Agreement, constitutes an infringement of any claim of patent.

**15.5 Binding Effect: Successors and Assigns.**

15.5.1 This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and permitted assignees.

15.5.2 Neither Party hereto shall assign or convey any of its rights, titles or interests under this Agreement without the prior written consent of the other Party hereto.

**15.6 Not for Benefit of Third Parties.** This Agreement and each and every provision thereof is for the exclusive benefit of the Parties hereto and not

for the benefit of any other party except that the other member entities are intended to benefit from the protections provided them in this Agreement in Article 14.

**15.7 Choice of Law.** This Agreement is made and is to be performed in California and any dispute arising therefrom shall be governed and interpreted in accordance with California laws.

**15.8 Article Headings and Subheadings.** All article headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

**15.9 No Waiver.** No waiver by a Party of any breach or default by the other Party of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach of default in the performance by such other Party of the same or any other obligations of such other Party hereunder. The giving of a waiver by a Party in any one instance shall not limit or waive the necessity to obtain such Party's waiver in any future instance. No waiver of any rights under this Agreement shall be binding unless it is in writing signed by the Party waiving such rights.

**15.10 Good Faith and Fair Dealing.** The Parties agree to deal fairly and to act in good faith in the performance or enforcement of this Agreement. Wherever this Agreement requires a consent or approval of a Party hereto, such

consent or approval shall not be unreasonably withheld or delayed except as otherwise specifically provided herein.

**15.11 Severability.** In the event that any of the provisions of this Agreement, or portions or applications thereof, are held to be unenforceable or invalid by any court of competent jurisdiction, the Member and NCPA shall negotiate an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

**15.12 Legal Capacity.** Each Party represents and warrants that it has the legal capacity to enter into this Agreement and to perform all obligations undertaken herein.

**15.13 No Counterparts.** This Agreement and any amendments will not be executed in counterparts but in one or more duplicate originals which shall constitute but one and the same instrument.

**15.14 Further Assurances.** If either Party reasonably determines that any further instruments, representation of assurance of payment, or performance, or any other things are necessary or desirable to carry out the terms of this Agreement, the other Party will execute and deliver all such instruments and



assurances and do all such things as the first Party reasonably deems necessary or desirable to carry out the terms of this Agreement.

**15.15 Hazardous Waste.** Although it is not presently contemplated that any Service or Transaction will involve “Hazardous Waste,” if on the contrary they do, then this section 15.15 shall apply. “Hazardous Waste” means (A) any product, substance, chemical, element, compound, mixture, solution, material, pollutant, contaminant or waste whose presence, nature, quantity or intensity of use, manufacture, processing, treatment, storage, disposal, transportation, spillage, release, or effect, either by itself or in combination with other materials, is regulated, monitored, or subject to reporting by any federal, state or local government entity; (B) those terms that are included within the definitions of “hazardous substances”, “hazardous materials”, “hazardous waste”, “extremely hazardous substances”, “toxic substances”, or “oil and hazardous substances”, as defined in one or more of the following environmental laws: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Sec. 9601 *et seq.* (“CERCLA”), as amended by the Superfund Amendments and Reauthorization Act of 1986 (“SARA”); the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Sec. 11001 *et seq.* (“EPCRTKA”); the Resource Conservation and Recovery Act, 42 U.S.C. Sec. 6901 *et seq.* (“RCRA”); the Toxic Substances Control Act, 15 U.S.C. Sec. 2601 *et seq.* (“TSCA”); the Federal Water

Pollution Control Act, 33 U.S.C. Sec. 1251 *et seq.* (the “Clean Water Act”); the Clean Air Act, 42 U.S.C. Sec. 7401 *et seq.* (“CAA”); the Hazardous Materials Transportation Act, 49 U.S.C. Sec. 5101 *et seq.* (“HMTA”); the Safe Drinking Water Act, 42 U.S.C. Sec. 300f *et seq.* (“SDWA”), or comparable state cleanup statutes, and in the regulations promulgated pursuant to said laws, all as amended from time to time; or (C) any material, pollutant, substance or waste that comprises, in whole or in part, includes, or is a by-product or constituent of (i) petroleum (including crude oil or any fraction thereof that is not specifically listed or designated as a hazardous substance, and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel), (ii) asbestos, (iii) polychlorinated biphenyls, (iv) flammables or explosives, (v) biochemical agents, or (vi) radioactive materials.

If, during the course of performing the Services or Transactions, either Party becomes aware of any Hazardous Waste that exists on or under the location of the Service or Transaction, whether or not created or brought on the location by a Party, the Party that so became aware shall report such condition to the Member in writing immediately and before disturbing (or further disturbing) the Hazardous Waste. NCPA shall not be liable for any Hazardous Waste on or under the location notwithstanding the fact that NCPA may have created, brought on, or released the Hazardous Waste into, over, on, or under the

location. The Member shall be solely liable for any Hazardous Waste at the location because of NCPA or any of its employees or subcontractors, and the Member shall perform all cleanup, removal, remediation and disposition services with respect thereto. In the event NCPA encounters Hazardous Waste at the location, NCPA shall take reasonable actions necessary to mitigate costs to the Member or liability of the Member due to such Hazardous Waste. The cost of actions taken by NCPA pursuant to this section shall be fully reimbursed by the Member to NCPA.

**15.16 Status of Parties and Regulatory Compliance.** The Parties acknowledge that this Agreement is formed between two public agencies. Neither Party shall have any claim against the members, governing officials, officers, employees or agents of either Party.

The Member is subject to the regulatory compliance requirements of several agencies. The Member shall be solely responsible for, and shall reimburse NCPA for any costs of compliance with any permits or license conditions, including any fines or penalties, to the maximum extent permitted by law.

**15.17 NCPA's Organization.** The Member is responsible for assuring for itself that NCPA's personnel are appropriately trained, educated, and skilled to competently perform the Services. The Member acknowledges and agrees that

NCPA makes no warranties or representations regarding the qualifications of its employees, agents, and subcontractors.

**15.18 Acknowledgments and Interpretation.** The Parties acknowledge and agree that the terms and conditions of this Agreement have been freely and fairly negotiated. The Parties acknowledge that in executing this Agreement they rely solely on their own judgment, belief, and knowledge, and such advice as they may have received from their own counsel, and they have not been influenced by any representation or statements made by any other Party or its counsel. No provision in this Agreement is to be interpreted for or against any Party because that Party or its counsel drafted such provisions.

**15.19 Default Termination.** Upon the occurrence of a material default, the non-breaching Party shall notify in writing the breaching Party of its intent to terminate this Agreement if the breach is not cured within thirty (30) days. If the breaching Party does not cure the event of default within such thirty (30) day period, the non-breaching Party may immediately terminate this Agreement for Default. Written notice of termination shall be delivered to the breaching Party at the address shown on page one (1) of this Agreement or as changed. Either party may provide a new address for such notice at any time by providing written notice to the other party.

**15.20 Default Termination Remedies.** In the event of a default termination for material breach or abandonment by Member, NCPA may by appropriate court action or actions, either at law or in equity, preserve its position to recover damages and expenses associated with the breach; and/or pursue, concurrently or separately, other remedies available in law, in equity or in bankruptcy in anticipation of pursuing its remedies pursuant to Article 16 of this Agreement.

**15.21 Survival.** The terms of this Agreement shall survive any termination or cancellation hereof to the extent necessary to allow a Party to enforce any remedy granted hereunder in connection with such termination or cancellation. The terms of Article 14 of this Agreement, entitled “Indemnification, Defense, and Release” shall survive any termination or cancellation, in perpetuity as to the Release, and otherwise for ten (10) years and one day after the effective date of termination or cancellation.

## **Article 16 - DISPUTE RESOLUTION**

**16.1 Negotiations.** The Parties will attempt in good faith to resolve through negotiation any dispute, arising out of or relating to this Agreement. Either Party may initiate negotiations by providing written notice in letter form to the other Party, setting forth the subject of the dispute and the relief requested.

The recipient of such notice will respond in writing within five (5) days with a detailed statement of its position on, and recommended solution to, the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each Party with full settlement authority will meet at a mutually agreeable time and place within ten (10) days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the Parties are unable to resolve the dispute at the meeting by negotiations, they shall consider mediation.

During any dispute and negotiation the Member shall continue to timely pay NCPA for Services rendered and Transactions for which obligations remain unsatisfied, even though such dispute may concern those Services or Transactions. NCPA agrees to continue performing the Services, provided that no payment due from the Member is overdue.

**16.2 Mediation.** The Parties agree that any and all disputes arising out of or relating to this Agreement that are not resolved by their mutual agreement after negotiations pursuant to section 16.1, should be submitted to mediation before JAMS, or its successor or similar alternative dispute resolution (ADR) organization of respected, retired judges, or to a private judge, as the Member may determine, in its reasonable discretion, and with the written consent of NCPA, provided that the Member will be responsible for all of the expenses of

mediation. Either Party may commence the mediation process called for in this Agreement by filing a written request for mediation with JAMS, its successor, or another ADR organization or private judge with a copy to the other Party. The Parties agree that they will participate in the mediation in good faith when and if the Member determines to invoke mediation as a dispute resolution remedy, at its expense.

**16.3 Waiver of Certain Judicial Rights.** If the Parties fail to either negotiate or mediate a mutually satisfactory resolution of any dispute, then upon written notice given twenty (20) days in advance, either Party may terminate this Agreement, subject to any unpaid or unreimbursed compensation or costs payable by the Member to NCPA, and without affecting the survival of Article 14, entitled “Indemnification, Defense, and Release” for its full term, notwithstanding any default hereunder by NCPA.

## **Article 17 – LIMITATION OF LIABILITY**

**17.1 Limitation of Liability.** To the extent the law allows, NCPA, its members, governing officials, officers, employees, and agents shall have no liability to the Member under this Agreement with respect to all claims however caused, arising out of the performance or non-performance of the Services and obligations under this Agreement, whether based in contract, warranty, tort

(including negligence), strict liability, or otherwise, including without limitation, liability for consequential damages pursuant to Article 18. NCPA shall not be required to carry any insurance, and even if insurance is carried by NCPA, such insurance shall not be available to the Member for any claim, death, damages, injuries, losses of any kind whatsoever, unless, and solely to the extent, that the Member procures such insurance of its own accounts, and pays, and is solely responsible for any and all premiums and costs related to such coverage. If notwithstanding the foregoing limitations of this Section 17.1, liability is imposed, then such total liability shall be limited to the net present value of the expertise NCPA gained through this Agreement that is of value to its other members.

## **Article 18 – CONSEQUENTIAL DAMAGES**

**18.1 Consequential Damages.** NCPA, its members, governing officials, officers, employees, and agents (excluding counterparties) shall not be liable to the Member, for incidental, indirect, punitive, exemplary, special or consequential loss or damage arising out of or relating to this Agreement, including, but not limited to, loss of use, customer claims and damages, loss of revenue, loss of power sales, loss of electric system reliability, outages and cascading disturbances, principal office expenses, delay, loss by reason of plant



shutdown or inability to operate, increased cost of operating and maintaining the Project, debt service, rental payments or contractual damages incurred by the Member or to others. The Member is and will remain through the survival provisions of Article 15 of this Agreement, solely responsible for such risks, losses, damages and costs, however described; including consequential damages that may be suffered by NCPA, its members, governing officials, officers, employees, and agents (excluding counterparties) arising from this Agreement.

IN WITNESS WHEREOF, the Parties hereto have entered into this Agreement on the Effective Date, having acknowledged and accepted the terms, conditions, promises, and covenants of this Agreement, as evidenced by the following signatures of the representatives of the Parties, who are represented and warranted to be fully and lawfully authorized, by all necessary official action, to execute and deliver this Agreement.

MEMBER:

NCPA:

CITY OF LODI

Northern California Power  
Agency

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: Konradt Bartlam

Name: James H. Pope


Title: City Manager

Title: General Manager

APPROVED AS TO FORM:

D. STEPHEN SCHWABAUER, City Attorney  
JANICE D. MAGDICH, Deputy City Attorney

APPROVED AS TO FORM:

By: \_\_\_\_\_  


By: \_\_\_\_\_  
Michael Dean, General Counsel

ATTEST:

By: \_\_\_\_\_  
RANDI JOHL, City Clerk

SINGLE MEMBER SERVICES AGREEMENT  
by and between the  
CITY OF LODI  
and the  
NORTHERN CALIFORNIA POWER AGENCY

ATTACHMENT A  
ADVISORY SERVICES

In accordance with the terms of the Agreement between Northern California Power Agency ("NCPA") and the City of Lodi ("Member"), NCPA may provide certain Advisory Services to Member, which includes technical, economic, financial, legal, risk and credit analysis, and other advice of a professional manner. Member has requested NCPA to provide the Advisory Services listed in this Attachment A, and NCPA has agreed to provide such Advisory Services in consideration of the costs of such activities as described herein.

**Scope of Advisory Services**

NCPA shall provide, at its discretion, Advisory Services to Member to assist Member in developing contract instruments to be utilized to consummate transactions in its own name for Energy and Renewable Energy Certificate ("REC") products. Such Advisory Services may include development of special terms and conditions to be used by Member in conjunction with industry standard contracts and/or development of bilateral contracts. NCPA may assist Member, through active and passive participation, in negotiation activities required to develop contract instruments and to consummate transactions. Notwithstanding the scope of Advisory Services provided herein, all Advisory Services supplied by NCPA to Member shall be in accordance with the terms and conditions of the Agreement.

**Cost of Advisory Services**

Member agrees to pay for any and all costs associate with NCPA's provision of Advisory Services. In accordance with Article 7 of the Agreement, all payments due from Member for Advisory Services shall be made in advance. Therefore, listed below is the estimated cost for the Advisory Services to be provided to Member. Upon completion of the Advisory Services, NCPA shall bill or credit Member for the difference between the estimated and actual costs of Advisory Services. Such invoicing will be conducted in accordance with the Agreement.

**Northern California Power Agency  
Single Member Services Agreement - City of Lodi  
Estimated Cost of Advisory Services**

**Scope: Development & Negotiation of Contract Instruments**

<u>Advisory Services (Estimated Costs)</u>	<u>Rate \$/Hr</u>	<u>Total Hours</u>	<u>Total Costs</u>
NCPA Staff Hourly Fee Basis	\$ 160	80	\$ 12,800
Legal Counsel Hourly Fee Basis	\$ 400	44	\$ 17,600
			<u>\$ 30,400</u>

<u>Advisory Services (# of Hours Staff/Legal Counsel)</u>	<u>NCPA Staff</u>	<u>Legal Counsel</u>
Contract Instrument Terms & Conditions Development	20	28
Development of REC Product Types	16	8
Request for Proposals / Limited Solicitation -- Evaluation	16	-
Contract Negotiations	8	4
Other Regulatory and Support Activities	8	4
Settlement & Operations	12	-
	<u>80</u>	<u>44</u>

The undersigned hereby approve the scope of Advisory Services and associated costs estimate described in this Attachment A, in accordance with the Agreement.

**CITY OF LODI**

**NCPA**

\_\_\_\_\_  
By: Konradt Bartlam  
City Manager

\_\_\_\_\_  
By: James H. Pope

Date:

Date:

APPROVED AS TO FORM:  
D. STEPHEN SCHWABAUER, City Attorney  
JANICE D. MAGDICH, Deputy City Attorney

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael Dean  
General Counsel

**ATTACHMENT B**  
**MEMBER REQUEST**  
**ENERGY PURCHASE AUTHORIZATION & CONFIRMATION**

The City of Lodi (Member), hereby confirms its request to purchase from the Northern California Power Agency (NCPA) each of the energy products described below. Such purchase shall be made in accordance with the terms of the Single Member Services Agreement for Special Transactions between Member and NCPA, and this Energy Purchase Authorization and Confirmation, each as may be amended from time to time. Member acknowledges that NCPA may acquire each energy and energy-related product described below, for subsequent resale to Member, pursuant to the terms of each standard-form industry agreement identified below as directed by Member's Utility Director, or his designee, each of whom by the approval as to legal form below by Member's attorney is warranted to possess the necessary authority to enter into such transactions on behalf of Member.

Member requests to purchase all the energy products described below in items (1) through (8) and those listed in any attachment(s) hereto:

1. Period of Delivery: From \_\_-\_\_-\_\_ To \_\_-\_\_-\_\_
2. Schedule (Days and Hours): \_\_\_\_\_
3. Delivery Rate: \_\_\_\_\_
4. Delivery Point(s): \_\_\_\_\_
5. Contract Quantity: \_\_\_\_\_ Total MWhrs /Mcf
6. Type of Agreement (Check as Applicable)  
WSPP \_\_\_\_\_  
EEI \_\_\_\_\_  
ISDA \_\_\_\_\_  
NYMEX \_\_\_\_\_  
NAESB \_\_\_\_\_  
OTHER \_\_\_\_\_  
Additional Contract Terms are attached: yes \_\_\_; no \_\_\_
7. Authorized Contract or Strike Price Range: \_\_\_\_\_
8. Other: \_\_\_\_\_

\_\_\_\_\_  
Authorized Signature for Member  
Utility Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Approved as to Legal Form  
Attorney for Member

\_\_\_\_\_  
Date

\_\_\_\_\_  
ATTEST: City Clerk

\_\_\_\_\_  
Authorized Signature for NCPA

\_\_\_\_\_  
Date

RESOLUTION NO. 2012-78

A RESOLUTION OF THE LODI CITY COUNCIL  
APPROVING THE SINGLE MEMBER SERVICES  
AGREEMENT BY AND BETWEEN THE CITY OF LODI  
AND THE NORTHERN CALIFORNIA POWER AGENCY,  
AND FURTHER AUTHORIZING THE CITY MANAGER TO  
EXECUTE SAID AGREEMENT

=====

WHEREAS, on April 12, 2011, the Governor of the State of California signed California Senate Bill 2 of the First Extraordinary Session, SBXI-2, Chapter 1, Statutes of 2011, First Extraordinary Session, (SBX1-2), known as the California Renewable Energy Resources Act, which became effective on December 10, 2011; and

WHEREAS, SBX1-2 requires that the amount of electricity generated from eligible renewable energy resources be increased to an amount that equals at least 20% of the total electricity sold to retail customers in California by December 31, 2013, 25% by December 31, 2016, and 33% by December 31, 2020; and

WHEREAS, while Lodi will need to adopt a Renewable Energy Resources Procurement Plan (RPS Procurement Plan) to meet the requirements of SBX1-2, the California State Energy Commission (CEC) still has not published the details of the requirements for such RPS Procurement Plans, though they were required to do so no later than December 31, 2011; and

WHEREAS, staff anticipates bringing a RPS Procurement Plan to Council for approval in the first quarter of fiscal year 2012/13; and

WHEREAS, SB1X-2 requirements will require different amounts of varying types of renewable resources in various years; these different types are called Portfolio Content Categories (PCC); and

WHEREAS, in anticipation of the RPS Procurement Plan staff has completed a preliminary analysis; based on this analysis it is expected that no net purchases will be required to meet SBX1-2 requirements through calendar year 2013; and

WHEREAS, analysis has also shown that Lodi has a surplus of the more valuable PCC 1, which includes renewable resource products that are scheduled from an eligible renewable energy resource directly into a California balancing authority; Lodi's surplus comes mostly from our entitlements to Northern California Power Agency (NCPA) geothermal plants; and

WHEREAS, this excess PCC 1 may be sold and replaced with a much less expensive PCC 3 resource; PCC 3 includes unbundled renewable energy credits that do not qualify under the criteria for other Content Categories; and this exchange of PCC types may result in savings to Lodi of as much as \$2 million this fiscal year; and

WHEREAS, NCPA is currently working to modify the Market Power Purchase Agreement (MPP) to enable NCPA to make these types of transactions for the MPP Participants, which includes Lodi; unfortunately it is unlikely that the MPP can be modified in time to make the transactions that need to be completed this year; and

WHEREAS, Lodi itself has neither the time nor experience to complete these transactions on our own in the available time frame: and

WHEREAS, NCPA has developed the Single Member Services Agreement (SMSA) and scope of work (Advisory Services) to facilitate such independent transactions, by assisting its members in carrying out economic and timely transactions; and

WHEREAS, the SMSA will allow additional scopes of work to be attached to it in the future, as needed from time to time; any additional scopes of work will require separate approvals by both NCPA and Lodi; potential transactions that come out of this process will still need to be approved in accordance with Lodi's existing approval process.

NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council does hereby approve the Single Member Services Agreement by and between the City of Lodi and the Northern California Power Agency and authorizing the City Manager to execute said agreement with administration by the Electric Utility Director.

Dated: June 6, 2012

=====

I hereby certify that Resolution No. 2012-78 was passed and adopted by the City Council of the City of Lodi in a regular meeting held June 6, 2012, by the following vote:

AYES: COUNCIL MEMBERS - Hansen, Johnson, Katzakian, Nakanishi,  
and Mayor Mounce

NOES: COUNCIL MEMBERS - None

ABSENT: COUNCIL MEMBERS - None

ABSTAIN: COUNCIL MEMBERS - None

  
RANDI JOHL  
City Clerk